No. 74-1332

In the Supreme Court of the United States

OCTOBER TERM, 1974

ROBERT E. BRITT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that he has standing to contest the admission of evidence seized in the warrantless search of the headquarters of a corporation of which he was the principal stockholder.

Petitioner and five others were charged in a 27-count indictment with inducing individuals to travel in interstate commerce as part of a scheme to defraud each individual of more than $5,000, in violation of 18 U.S.C. 2314.[1] Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on fourteen counts and sentenced to concurrent terms of six years' imprisonment on each count. The court of appeals affirmed (Pet. App. A-1 to A-9; 508 F.2d 1052).

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[1]Three co-defendants pleaded guilty to the counts in which they were charged, one was acquitted, and the charges against another were dismissed.

1. The facts have been summarized by the court of appeals (Pet. App. A-4 to A-6). In the fall of 1970 petitioner was president of Fitts Cotton Goods, a diaper manufacturing corporation facing serious financial difficulty. In order to raise capital, the corporation sold "exclusive distributorships" to people who, during a visit to corporate headquarters in Atlanta, Georgia, were promised that their exclusive distributorships would yield five percent commissions on sales to existing accounts and 10 percent commissions on new accounts. In order to induce prospective "distributors" to pay between $5,000 and $25,000 for their territorial rights, petitioner and his co-defendants presented false or grossly exaggerated figures concerning Fitts' sales volume and the number of firms with which Fitts did business.

Disillusioned distributorship purchasers, whose commissions did not approach the inflated projections provided (and who were unable to recover their investments from Fitts), complained to the Federal Bureau of Investigation, which obtained a search warrant for Fitts' business records maintained at corporate headquarters at 3379 Peachtree Road, Atlanta. They also obtained an arrest warrant for petitioner. The agents served the search warrant upon Mr. Raymond Brewer, comptroller of Fitts, who telephoned petitioner and read the warrant to him. Petitioner told Brewer to comply with the warrant. Brewer told the agents that additional Fitts records were maintained at 1819 Peachtree Road. After the agents seized several items at 3379 Peachtree Road, Mr. Brewer gave them permission to search 1819 Peachtree Road, accompanied them to that address, obtained the key and opened the door for them.

Some papers were seized from a storage area at 1819 Peachtree. Two types of these seized documents were used in the case against petitioner—sales invoices indicating the correct volume of Fitts' business in various territories and a list of names and telephone numbers of several Fitts distributors.

Petitioner moved to suppress the items seized at 1819 Peachtree. He argued that the warrantless search of those premises was improper because Brewer's permission had been prompted by his mistaken belief that the warrant authorized a search of 1819 Peachtree. The district court granted petitioner's motion and ordered the items returned to him; it suggested, however, that the government might obtain the documents by a supoena duces tecum.

The government then subpoenaed the invoices and distributor list with telephone numbers; it requested that its appeal of the suppression order be dismissed. Petitioner's motion to quash the government's subpoena was denied by the district court, which held that the government possessed independent knowledge of these documents untainted by the prior search. The invoices, distributor list, and testimony of several victims whose names were found on the distributor list were admitted at trial.

The court of appeals questioned whether the government had demonstrated independent knowledge of the existence of the invoices prior to the time that it requested the subpoena and pointed out that the government had made use of the distributor list before it had been obtained "legitimately" by subpoena. It held, however, that the evidence was properly admitted because petitioner lacked standing to challenge the validity of the initial search and seizure at 1819 Peachtree.

2. Petitioner contends that he has standing because he is a "person aggrieved" by the search within the meaning of Fed. R. Crim. P. 41(e) and (f) and *Henzel* v. *United States*, 296 F.2d 650 (C.A. 5). In *Henzel* the sole owner of a corporation was permitted to challenge the warrantless seizure (during a search directed at him personally) of documents contained in his private office and personally prepared by him.[2] In *Mancusi* v. *DeForte*, 392 U.S. 364, the Court held that a union official had standing to challenge a search of his personal office and a seizure of papers that were in his personal custody. But cf. *Bellis* v. *United States*, 417 U.S. 85. The court below, however, held that there was no nexus here between the storage area searched at 1819 Peachtree and the workspace of petitioner. It wrote (Pet. App. A-8):

> Here, although Britt was president of Fitts, he was not its sole stockholder, the documents seized were normal corporate records not prepared personally by him, and the area searched at 1819 Peachtree Road was described as a "storage area." [Footnote omitted.] Furthermore, there is no evidence that Britt spent any of his time working in the storage area—or in any other space at 1819 Peachtree for that matter —or that any of the material seized there was taken from his personal desk or briefcase or files. He was in the hospital at the time of the search and had been for several months prior to it. Furthermore, there is nothing in the record which would indicate that the searches, either at 3379 or 1819, were directed at him rather than at corporate activity generally. Under such circumstances, we conclude that we should apply the normal rule which is that,

[2]Petitioner's contention that the court below misunderstood, or altered the meaning of, its own precedent presents no question requiring review by this Court. A court of appeals may determine the scope and effect of its own decisions.

> When a man chooses to avail himself of the privilege of doing business as a corporation, even though he is its sole shareholder, he may not vicariously take on the privilege of the corporation under the Fourth Amendment; documents which he could have protected from seizure, if they had been his own, may be used against him, no matter how they were obtained from the corporation. Its wrongs are not his wrongs; its immunity is not his immunity.
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> *Lagow* v. *United States*, 159 F.2d 245, 246 (2d Cir. 1946), cert. denied, 331 U.S. 858, 67 S. Ct. 1750, 91 L.Ed. 1865 (1947).

Petitioner cites no case (and we know of none) holding that a corporate official not on the premises at the time of the search has standing to challenge the search of an area other than his personal office. The court of appeals' decision is correct and does not require review by this Court.

3. Moreover, even assuming *arguendo* that petitioner has standing, there is an independent ground sufficient to support the court's judgment. The search of 1819 Peachtree took place with the consent of an official of the corporation. Brewer, as comptroller and custodian of the records, had authority to consent to the search of the office of Fitts Corporation. See *United States* v. *Antonelli Fireworks Company*, 155 F.2d 631 (C.A. 2), certiorari denied, 329 U.S. 742. Brewer did not simply acquiesce to a claim of lawful authority; the agents made no such claim. At several points during his testimony at the April 3, 1973, suppression hearing, Brewer testified that his approval of the search at 1819 Peachtree was not motivated by the search warrant for 3379 Peachtree (Tr. 57, 62).

But even if Brewer's permission had been influenced by a mistaken belief that the scope of the search warrant included Fitts' offices at 1819 Peachtree, there is no evidence that such a belief was induced in any way by misrepresentations by the agents concerning the scope of the warrant. Under these circumstances Brewer's consent was effective. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218; *United States* v. *McCann*, 465 F.2d 147 (C.A. 5), certiorari denied *sub nom. Kelly* v. *United States*, 412 U.S. 927; *United States* v. *Resnick*, 455 F.2d 1127 (C.A. 5), certiorari denied *sub nom. Carlton* v. *United States*, 409 U.S. 875. The evidence was therefore properly seized, and the question of petitioner's standing need not be addressed.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.